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RHB Bank Bhd v Singlefine (M) Sdn Bhd & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA22NCC-234–06 OF 2018
AZIZUL AZMI ADNAN J
27 MAY 2019

C *Contract — Breach — Contract to restructure loan — Restructure term loan facility — Defendants failed to pay sum demanded — Plaintiff sued defendants for sums under restructure term loan facility — Whether plaintiff's sole recourse was against obligor under deed of assignment of contract proceeds — Whether* D *plaintiff precluded from claiming against defendants — Whether consent judgment and restructuring agreement were not enforceable on account of undue influence — Contracts Act 1950 s 16*

This was the plaintiff's action against the defendants pursuant to a E restructuring agreement entered between the plaintiff and the first defendant pursuant to a consent judgement where the second and third defendants were guarantors of the first defendant's obligations to the plaintiff. The first defendant had entered into a facilities agreement with the plaintiff and secured by the personal guarantee executed by the second and third defendants and a F deed of assignment of contract proceeds where the borrower assigned all present and future proceeds under the contract. The plaintiff had in 2013 commenced a writ action against the defendants and in 13 December 2013 the parties entered into a consent judgement which were eventually termed as a restructure term loan facility. The defendants contended that they were not G liable to the bank because the intention of the parties was for the plaintiff to be repaid through the proceeds of the contract and therefore the bank's recourse was against the main contractor being H&I Niaga Sdn Bhd under the deed of assignment of contract proceeds and not against the borrower; and the bank had applied undue pressure and influence on the defendants in procuring the H consent judgement and therefore it was unenforceable.

Held, allowing the plaintiff's claim with costs:

(1) In order to determine whether an assignment takes effect by way of a charge only or is an absolute assignment, it has to be ascertained as a I matter of proper construction. The test is thus an objective one: it does not matter what a party had in fact thought that a particular clause meant. The question is what would a reasonable person in the position of that party would have understood by the provision in question. In construing the assignment, the court would be entitled to take into

account the circumstances up to the date of the signing of the assignment, save for matters pertaining to the negotiation of the contract that are merely declarative of a party's subjective intent (see para 19).

(2) The mere fact that the deed of assignment of contract proceeds operated as an absolute assignment did not ipso facto mean that the bank's sole recourse was to the obligor, H&I Niaga Sdn Bhd. An examination of the terms of the facilities agreement made it clear that the borrower was not absolved from repayment of the facilities. Clause 3.05(1) of the facilities agreement clearly and unequivocally provided for an obligation of the borrower to repay the various loans under the facilities agreement. Further, the terms of the personal guarantee provided that the second and third defendants were principal debtors for the guarantee obligations. As such, the personal guarantee was also a contract of indemnity. The existence of the obligation of the second and third defendants to indemnify the bank clearly militated against any construction that somehow the bank's only recourse was against the obligor (see paras 21–24).

(3) In relation to undue influence, unless one of the presumptions in s 16(2) of the Contracts Act 1950 ('the Act') applies, three requirements must be fulfilled in order for undue influence to exist: (a) one of the parties must have been in a position to dominate the will of the other party; (b) the party in the position to dominate the will of the other must have used that position to influence the other party; and (c) the dominant party obtained an unfair advantage as a consequence (see para 37).

(4) The relationship of trust and confidence that arises in a normal banking relationship is clearly insufficient to amount to a fiduciary relationship. The counsel suggested to the plaintiff's witness that she would not do business with someone whom she did not trust, to which she quite reasonably agreed. By no stretch of the imagination could her answer be said to be indicative of the existence of a fiduciary relationship. Therefore, the bank was not a fiduciary to the defendants in the present case and that accordingly the deeming provision in s 16(2)(a) of the Act did not apply. The defendant therefore needed to prove actual undue influence, under s 16(1) of the Act and the three constituent elements (see paras 72–73 & 75).

(5) Section 16 of the Act was concerned not with the lack of parity in the parties' bargaining position, but rather in the dominance of the will of the bank over the defendants. There indeed was little time for the borrower to consider the terms of the bank's settlement offer, but that did not mean that there was a subversion of the will of the directors. The court was satisfied that the way in which the relationship was managed by the bank

was nothing more than the proper conduct of its business in the ordinary course, which, by virtue of illustration (d), precluded any notion of undue influence (see para 79).

(6) At law, the liability of a guarantor is co-extensive with that of the obligor (the borrower in this case). Under s 81 of the Act, the bank had a right to sue the second and third defendants for their undertakings in the personal guarantee. The terms of the personal guarantee not only provided for liability of the second and third defendants as surety of the obligations of the borrower under the facility agreement, but also provided — in cl 9 — that they were principal debtors for the guaranteed obligations. As such, on its true construction, the personal guarantee was also a contract of indemnity. The validity of the obligations under an indemnity was unaffected by, and not dependent on, the validity of the obligations of the original obligor. This was because the undertaking by the second and third defendants to pay the indebtedness owed by the borrower was also a primary obligation of the second and third defendants (see paras 87–88).

[Bahasa Malaysia summary

Ini merupakan tindakan plaintif terhadap defendan-defendan berkaitan dengan perjanjian penstrukturan semula antara plaintif dan defendan pertama selaras dengan penghakiman persetujuan yang mana defendan kedua dan ketiga merupakan penjamin obligasi defendan pertama terhadap plaintif. Defendan pertama telah memasuki perjanjian fasiliti dengan plaintif yang dijamin dengan jaminan peribadi yang dilakukan oleh defendan kedua dan ketiga dan satu surat ikatan penyerahhakkan berkaitan dengan hasil kontrak yang mana peminjam menyerahkan semua hasil kini dan akan datang di bawah kontrak. Plaintif telah pada tahun 2013 memulakan tindakan writ terhadap defendan-defendan dan pada 13 Disember 2013 pihak-pihak telah memasuki satu penghakiman persetujuan yang mana telah kemudiannya dinamakan sebagai satu fasiliti penstrukturan semula pinjaman. Defendan menyatakan bahawa mereka tidak bertanggungan kepada bank kerana niat pihak-pihak adalah untuk plaintif dibayar semula melalui hasil kontrak tersebut dan oleh itu, tindakan bank adalah terhadap kontraktor utama iaitu H&I Niaga Sdn Bhd dibawah surat ikatan penyerahhakkan dan bukannya terhadap peminjam; dan bank telah menggunakan tekanan dan pengaruh tidak wajar terhadap defendan-defendan dalam mendapatkan penghakiman persetujuan dan oleh itu ianya tidak boleh dilaksanakan.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Untuk menentukan sama ada satu penyerahhakkan berkesan dengan cara satu cagaran sahaja atau merupakan satu penyerahhakkan mutlak, ianya perlu ditentukan sebagai satu perkara penafsiran. Ujian untuk menentukkannya adalah satu ujian yang objektif; ianya tidak kira apa

yang difikirkan oleh satu pihak apa yang dimaksudkan oleh mana-mana klausa. Persoalannya adalah apa yang akan difahami oleh seorang waras dalam kedudukan pihak-pihak berkenaan dengan satu-satu peruntukan tersebut. Dalam menafsirkan penyerahhakkan, mahkamah berhak untuk mengambil kira keadaan sehingga tarikh penyerahhakkan ditandatangani, kecuali perkara berkaitan dengan rundingan kontrak yang hanya menyatakan niat subjektif satu-satu pihak (lihat perenggan 19).

(2) Fakta yang surat ikatan penyerahhakkan hasil kontrak bertindak sebagai satu penyerahhakkan mutlak tidak, disebabkan oleh fakta itu sendiri, bermaksud bahawa satu-satunya hak untuk mendapatkan penyelesaian adalah pada penanggung obligasi, H&I Niaga Sdn Bhd. Satu penelitian terma perjanjian fasiliti menunjukan dengan jelas bahawa peminjam tidak dibebaskan daripada pembayaran semula fasiliti. Klausa 3.05(1) perjanjian fasiliti dengan jelas dan nyata memberikan satu tanggungjawab kepada peminjam untuk membayar semula kesemua pinjaman dibawah perjanjian fasiliti tersebut. Lanjutan itu, terma jaminan peribadi, memperuntukkan bahawa defendan kedua dan ketiga merupakan pemiutang prinsipal untuk tanggungjawab jaminan. Oleh yang demikian, jaminan peribadi juga merupakan satu kontrak perlindungan. Kewujudan tanggungjawab defendan kedua dan ketiga untuk menanggung rugi bank dengan jelas bertentangan dengan apa-apa tafsiran yang satu-satunya jalan penyelesaian kepada bank adalah terhadap penanggung obligasi (lihat perenggan 21–24).

(3) Berkaitan dengan pengaruh tidak wajar, kecuali mana sala satu anggapan didalam s 16(2) Akta Kontrak 1950 ('Akta tersebut') terpakai, tiga prasyarat perlu dipenuhi untuk menunjukan kewujudan pengaruh tidak wajar: (a) salah satu pihak mesti berada dalam kedudukan untuk menguasai niat pihak bertentangan; (b) pihak dalam kedudukan untuk menguasai niat pihak yang satu lagi hendaklah menggunakan kedudukan tersebut untuk mempengaruhi pihak yang satu lagi; dan (c) pihak yang dominan mendapatkan keuntungan tidak adil sebagai kesan (lihat perenggan 37).

(4) Hubungan kepercayaan dan keyakinan yang wujud dalam perhubungan perbankan biasa jelas tidak memadai untuk terjumlah kepada satu hubungan fidusiari. Peguam mencadangkan kepada saksi plaintif yang dia tidak akan melakukan urusniaga dengan seorang yang dia tidak mempercayai, yang mana dia bersetuju. Namun tidak diluar jangkaan imaginasi boleh jawapannya dikatakan untuk menunjukan kewujudan satu hubungan fidisiari. Oleh itu, bank bukanlah fidusiari kepada defendan-defendan dalam kes ini dan oleh itu, peruntukan dalam s 16(2)(a) Akta tersebut tidak terpakai. Defendan oleh itu, hendak membuktikan bahawa pengaruh tidak wajar sememangnya wujud

dibawah s 16(1) Akta tersebut dan tiga elemen yang berkaitan (lihat perenggan 72–73 & 75).

(5) Seksyen 16 Akta tersebut tidak menghiraukan kekurangan kesetaraan dalam kedudukan tawar-menawar pihak-pihak, tetapi menghiraukan dalam penguasaan niat bank terhadap defendan-defendan. Adalah jelas bahawa peminjam menghadapi kekangan masa untuk menimbangkan terma tawaran penyelesaian bank, namun ianya tidak bermaksud bahawa wujud subversi niat pengarah-pengarah. Mahkamah berpuas hati bahawa cara yang mana hubungan tersebut diuruskan oleh bank tidak lebih daripada perjalanan sah urusannya dalam perjalanan biasa, yang man, selaras dan ilustrasi (d), mengecualikan apa-apa tanggapan pengaruh tidak wajar (lihat perenggan 79).

(6) Di sisi undang-undang, liabiliti penjamin adalah sama dengan penanggung obligasi (peminjam dalam kes ini). Dibawah s 81 Akta tersebut, bank mempunyai hak untuk menyaman defendan kedua dan ketiga atas akujanji mereka dalam jaminan peribadi. Terma jaminan peribadi bukan sahaja memperuntukkan untuk liabiliti defendan kedua dan ketiga sebagai penjamin kepada tanggungjawab peminjam di bawah perjanjian fasiliti, tetapi juga diperuntukan — dalam klausa 9 — bahawa mereka merupakan pemiutang utama untuk tanggungjawab yang diberi jaminan. Oleh itu, atas pentafsiran sebenar, jaminan peribadi tersebut juga merupakan satu kontrak tanggung rugi. Kesahan tanggungjawab di bawah satu tanggungan rugi tidak menerima kesan dari, dan tidak bergantung kepada, kesahan tanggungjawab penanggung obligasi asal. Ini adalah kerana aku janji oleh defendan kedua dan ketiga untuk membayar keberhutangan peminjam dan juga adalah tanggungjawab utama defendan kedua dan ketiga (lihat perenggan 87–88).]

Notes

For a case on contract to restructure loan, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) para 3822.

Cases referred to

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619; [2014] 1 AMCR 1; [2014] 2 CLJ 773; [2014] 4 MLRA 104, CA (refd)

Barclays Bank plc v O'Brien and another [1993] 4 All ER 417, HL (refd)

Barclays Bank plc v Quincecare Ltd and another [1992] 4 All ER 363, QBD (refd)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 AMR 333; [2004] 1 CLJ 357; [2003] 2 MLRA 313, CA (refd)

Chua Yung Kim v Madlis bin Azid @ Aziz & Ors [2018] 1 MLJ 192; [2017] 8 AMR 417; [2018] 3 CLJ 47; [2018] 1 MLRA 664, CA (refd)

Inche Noriah v Shaik Allie bin Omar [1929] AC 127, PC (refd)
Lloyds Bank Ltd v Bundy [1974] 3 All ER 757; [1975] QB 326, CA (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 1 AMR 1036; [1997] 2 CLJ 36; [1996] 2 MLRA 491, SC (refd)
National Westminster Bank plc v Morgan [1985] 1 All ER 821; [1985] AC 686, HL (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268; [1985] 1 CLJ 56; [1984] 1 MLRA 477, FC (refd)
Polygram Records v The Search [1994] 3 MLJ 127; [1994] 3 AMR 2060; [1994] 3 CLJ 806; [1994] 2 MLRH 137, HC (refd)
Poosathurai v Kannappa Chettiar (1919) LR 47 In App 1 (refd)
Royal Bank of Scotland v Etridge (No 2) and other appeals; Barclays Bank plc v Coleman; Bank of Scotland v Bennett; Kenyon-Brown v Desmond Banks & Co (a firm) [2001] 4 All ER 449; [2002] 2 AC 773, HL (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177; [2016] 1 MLRA 1, FC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265; [1996] 2 AMR 2633; [1997] 2 CLJ 607; [1996] 2 MLRA 563, CA (refd)
Tufton v Sperni [1952] 2 TLR 516 (refd)

Legislation referred to

Contract Act 1872 [IND]
Contracts Act 1950 ss 16, 16(1), (2), (2)(a), (3)(a), 20, 81
National Land Code

Hoi Jack S'ng (Andrea Chew Mei Yng with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.
Pavendeep Singh Gurbachan Singh (Paven & Co) for the defendants.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The plaintiff, RHB Bank Bhd ('bank'), sued the first defendant, Singlefine (M) Sdn Bhd ('borrower'), under a restructuring agreement entered into between them pursuant to a consent judgment. The second and third defendants were guarantors of Singlefine's obligations to the bank (although on a true construction of the personal guarantee executed by them, they had agreed to be liable as principal debtors and not merely as surety).

MATERIAL BACKGROUND FACTS

[2] The borrower was a subcontractor that had been awarded, in December 2005, a contract to undertake electrical works in connection with the

construction of a building owned by Bank Negara, known as Sasana Kijang. The contract was awarded to the borrower by the main contractor, H&I Niaga Sdn Bhd.

[3] On 8 January 2007, the borrower entered into a facilities agreement with the bank. The facilities agreement was secured by, among others, the personal guarantee executed by the second and third defendants and a deed of assignment of contract proceeds. Under this deed, the borrower assigned all present and future proceeds under the contract that had been awarded to it by H&I Niaga Sdn Bhd.

[4] In 2009, H&I Niaga Sdn Bhd was terminated as the main contractor for the construction project.

[5] In 2013, the bank commenced a writ action against the defendants, seeking to recover amounts that it claimed were owing under the facilities agreement. On 13 December 2013, a consent judgment was entered into between the parties. This consent judgment incorporated the terms of a letter dated 12 December 2013. Under this letter, the amounts due under the facilities agreement together with accrued interest (which were capitalised) were converted into what was termed as a restructure term loan facility ('RTL facility'). The RTL facility was repayable over a period of seven years.

[6] The letter of 12 December 2013 required the borrower to execute formal legal documentation. On 21 March 2014, a restructuring agreement was entered into between the bank and the borrower for this purpose. Both the 12 December 2013 letter and the restructuring agreement preserved all rights under the security documents previously executed pursuant to the facilities agreement.

[7] In May 2018, the plaintiff bank issued demands to the defendants for amounts outstanding under the RTL facility. The bank commenced this suit after the defendants failed to pay the sums demanded.

THE DEFENDANTS' CASE

[8] The fact of the original loan and the existence of the consent judgment were not in dispute between the parties. Nonetheless, the defendants contended that they were not liable to the bank because:

(a) the intention of the parties was for the bank to be repaid through the proceeds of the contract between H&I Niaga Sdn Bhd and the borrower.

Accordingly—it was argued—the bank's recourse was against H&I Niaga Sdn Bhd under the deed of assignment of contract proceeds, and not against the borrower; and

(b) the bank had applied undue pressure and influence on the defendants in procuring the consent judgment, and accordingly the consent judgment, the 12 December 2013 letter and restructuring agreement were unenforceable for this reason.

[9] These two issues are addressed in turn in the following paragraphs.

THE BANK'S RECOURSE

[10] Mr Pavendeep for the defendants argued that, because the deed of assignment of contract proceeds was expressed to be an absolute assignment, the bank's sole recourse was against the obligor, H&I Niaga Sdn Bhd.

[11] This argument, in my respectful view, was a non sequitur. Just because the deed effected an absolute assignment did not preclude the bank from claiming for repayment of the RTL facilities or from enforcing the personal guarantee.

[12] The operative provision in the deed of assignment of contract proceeds provided as follows:

> In consideration of the Bank having granted agreeing or continuing to grant to the Assignor the Facility and as a continuing security for the payment and discharge of the Facility, the Assignor hereby covenant with the Bank to assign unto the Bank absolutely, free from all liens, charges and other encumbrances, all the Assignor's present and future rights, title and interest in and to, and all benefits accrued and to accrue to the Assignor under the Contract ... (see cl 2.1 of the deed of assignment of contract proceeds, at A/81 of the trial bundle).

[13] Mr Pavendeep referred the court to the following passage from the judgment of the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; [1985] 1 CLJ 56; [1984] 1 MLRA 477 explaining the effect of an absolute assignment as compared to an assignment purporting to be by way of charge only:

> It is common ground that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of s 4(3) of the Civil Law Act 1956, then the appellant, as assignor was not entitled to sue in its own name but the action should be brought by the assignee (Public Bank) in its own name or by the assignee in the name of the assignor (*Read v Brown* (1889) 22 QBD 128; *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190 and *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 WLR 919).

[14] In that case, the assignor sought to sue the obligor under a contract, but it was held that it was not competent for the assignor to do so, because all the rights under the contract had been assigned to the assignee bank.

[15] A brief explanation will be necessary to describe the various circumstances under which an assignment may be requested by a financier in connection with a proposed loan to be granted by it.

[16] Where a home purchaser purchases a property from a developer, but where the property is still held under a master title and is pending sub-division, a financier will require the purchaser to assign to the financier the benefit of the sale and purchase agreement entered into between the purchaser and the developer. The assignment here is by way of charge only, and is intended to provide security to the financier pending the issuance of the individual title for the property whereupon a charge under the National Land Code would be entered over the property in favour of the financier. The assignment does not operate as an absolute assignment, because not all of the rights, title and interest over the property are assigned to the financier; the assignor retains a residual right in respect of the property in the event he or she redeems the loan from the financier, in which case he or she is entitled for the rights, interest and title to be re-assigned to him or her. A similar right that exists in respect of legal mortgages is referred to at common law as the equity of redemption.

[17] Contrast this with the situation where a financier provides project financing to a borrower. The financier may require the borrower's receivables under the project to be assigned to it. In such circumstances, the receivables are customarily assigned absolutely to the financier. The receivables become the property and assets of the financier, which the financier would apply towards reduction of the sums owing by the borrower to the financier. In other words, the financier becomes absolutely entitled to the contract proceeds. The assignment operates as an absolute assignment because the borrower does not retain any residual property right over the receivables; all it has are contractual rights for the proceeds to be applied in reduction of its borrowings.

[18] In both examples above, the assignments would customarily be described as 'security', and the related documentation as 'security documents'. They are 'security' because both types of transactions place the financier in a more secure position than if there were no such 'security'. However, only the assignment by way of charge truly creates a *security interest* over the subject matter of the assignment. By contrast, in the case of an assignment of contract proceeds, the proceeds or receivables become the outright property of the financier (but it will have a contractual obligation to reduce the indebtedness of the borrower by a corresponding amount). The proceeds will become the

absolute property of the bank, and no security interest will be created over such proceeds pursuant to the assignment.

[19] Whether or not an assignment in any particular case takes effect by way of charge only or is an absolute assignment has to be ascertained as a matter of the proper construction of the assignment in question. The object of the exercise of construction is to ascertain the meaning of the contract to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The test is thus an objective one: it does not matter what a party had in fact thought that a particular clause meant. The question is what would a reasonable person in the position of that party would have understood by the provision in question. In construing the assignment, the court would be entitled to take into account the circumstances up to the date of the signing of the assignment, save for matters pertaining to the negotiation of the contract that are merely declarative of a party's subjective intent: *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177; [2016] 1 MLRA 1.

[20] The court is thus entitled to take into account the terms of the other documents executed contemporaneously with the deed of assignment of contract proceeds in order to ascertain the intention of the parties.

[21] In my judgment, the mere fact that the deed of assignment of contract proceeds operated as an absolute assignment did not ipso facto mean that the bank's sole recourse was to the obligor, H&I Niaga Sdn Bhd. An examination of the terms of the facilities agreement will make it clear that the borrower is not absolved from repayment of the facilities. Clause 3.05(1) of the facilities agreement provides as follows:

> (1) In consideration of the Bank granting and/or continuing from time to time, at its sole and absolute discretion, to grant to the Borrower the Facilities and other banking facilities, the Borrower will on demand pay to the Bank the Indebtedness AND until demand as aforesaid, the Borrower shall repay the Facilities together with interest commission banking or other charges and expenses payable thereon at the times and in the manner as prescribed in the Letters of Offer.

[22] This clause clearly and unequivocally provides for an obligation of the borrower to repay the various loans under the facilities agreement.

[23] In addition, if indeed the bank's recourse was only to the deed of assignment of contract proceeds, then what would have been the purpose for the personal guarantee?

[24] The terms of the personal guarantee not only provided for the

guarantee by the second and third defendants of the obligations of the borrower under the facility agreement, but also provided that they were principal debtors for the guaranteed obligations (see cl 9 of the personal guarantee, at A/66). As such, on its true construction, the personal guarantee was also a contract of indemnity. The existence of the obligation of the second and third defendants to indemnify the bank clearly militates against any construction that somehow the bank's only recourse was against the obligor, H&I Niaga Sdn Bhd.

[25] I therefore rejected that the contention by the defendants that the bank could only have proceeded to recover the loan from H&I Niaga Sdn Bhd and that the bank did not have locus standi to prosecute this claim against the defendants.

UNDUE INFLUENCE

[26] It was contended by the defendants that the bank had applied undue pressure and influence on the defendants in procuring the consent judgment, and accordingly the consent judgment, the 12 December 2013 letter and restructuring agreement were unenforceable.

Objection regarding admissibility

[27] At trial, the plaintiff's sole witness sought to testify that the defendants had been represented by counsel in the previous proceedings in 2013. Mr Pavendeep objected to the relevant question and answer in the witness statement, on the basis that the point had not been pleaded by the plaintiff.

[28] I recorded the objection by the defence and directed that counsel address their arguments at the end of trial as to whether or not the evidence of the plaintiff's witness regarding the fact that the defendants had been represented by counsel may be admitted into evidence.

[29] In the reply to the defence, the plaintiff had simply put the defendants to strict proof of their contentions regarding undue influence:

> 5. With regard to paragraph 6.9 and the details under paragraph 6 of the Defence, the Plaintiff denies that it has unduly pressured and influenced the Defendants to accept the settlement terms under the letters dated 20.10.2010, 1.12.2012 and 12.12.2013. The Defendants are put to strict proof to show that such undue pressure and influence was ever exerted.

[30] Where a party to an action has merely denied the existence of a contended fact but has not put forward an affirmative case in his or her pleadings, it would not be open to that party, at trial, to seek to adduce evidence

of that affirmative case. This is explained by the Court of Appeal in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 AMR 333; [2004] 1 CLJ 357; [2003] 2 MLRA 313. This case involved the situation where the defendant had put the plaintiff to strict proof of its case, but the same principles would apply where the plaintiff, in its reply to the defence, has put the defendant to strict proof of its contentions. Gopal Sri Ram JCA stated:

> Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty — whether in contract or tort — may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct. So, in *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425 (folld) at p 428, Lord Evershed MR said:
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> > I think that a defendant — whether he is an underwriter or any other kind of defendant — is entitled to say, by way of defence, 'I require this case to be strictly proved, and admit nothing'. Where such is the defence, the onus remains throughout upon the plaintiffs to establish the case they are alleging. Where such is the form of the pleading, it is not only not obligatory upon the defendants but it is not even permissible for them to proceed to put forward some affirmative case which they have not pleaded or alleged: and it is not therefore, right that they should, by cross-examination of the plaintiffs or otherwise, suggest such an affirmative case. The defendants are acting correctly if they follow the course adopted in this case — that is, so to challenge, at each point, and by proper evidence, where it is admissible, and by cross-examination, the case which the plaintiffs seek to make good.
> >
> > The result, where such is the form of the defence and of the issues raised, is no doubt such that the judges will watch carefully that defendants, first, do not attempt by evidence or cross-examination, to establish some affirmative case of which no proper notice has been given by way of pleading to the other side; and second, do not attempt to lead evidence solely directed to the credit of witnesses.

[31] I therefore agree with the submissions of the counsel for the defendants that, with the plaintiff having put the defendants to strict proof of their contentions of undue influence, the plaintiff could not then raise an affirmative case to rebut the contentions. Accordingly, the answer given by plaintiff's witness to question 14 in her witness statement ought not be admitted into evidence.

[32] On the facts of this case, however, there was already evidence properly before the court regarding the involvement of lawyers acting on behalf of the defendants. This is evident from the consent order itself as well as correspondence between the plaintiff's lawyers and the defendant's lawyers. These two items of evidence have been agreed upon by the parties as Part B documents, ie documents whose authenticity is not disputed.

[33] The evidential burden of proving undue influence lay with the defendants, and the court is entitled to look into the body of evidence that is before it in order to ascertain whether this defence has been made out. In my view, the court can quite properly consider the fact that the consent judgment appeared to have been recorded on the presence of counsel for the defendants and the fact that there appeared to have been correspondence between the respective parties' lawyers. The court may then draw whatever appropriate inferences from these items of evidence.

Undue influence: The applicable principles

[34] Section 20 of the Contracts Act 1950 provides for a power of the court to set aside a contract that has been procured by undue influence. Section 20 provides as follows:

> Section 20 Power to set aside contract induced by undue influence.
>
> When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.

[35] Under s 20, a contract in which the consent of a party has been obtained by undue influence would be voidable at the instance of that party. The contract is voidable, and not void. The contract may be set aside absolutely, or subject to conditions that favour the party seeking to set it aside.

[36] Section 16 of the Contracts Act 1950 explains the circumstances that constitute undue influence. Section 16 provides as follows:

> Section 16 'Undue influence'.
>
> (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3)(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the

evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

(b) Nothing in this subsection shall affect section 111 of the Evidence Act 1950 [Act 56].

ILLUSTRATIONS

(a) A having advanced money to his son, B, during his minority, upon B's coming of age, obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the moneylender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

[37] Unless one of the presumptions in sub-s (2) applies, three requirements must be fulfilled in order for undue influence to exist:

(a) one of the parties must have been in a position to dominate the will of the other party;

(b) the party in the position to dominate the will of the other must have used that position to influence the other party; and

(c) the dominant party obtained an unfair advantage as a consequence.

[38] The Court of Appeal in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265; [1996] 2 AMR 2633; [1997] 2 CLJ 607; [1996] 2 MLRA 563 accepted that s 16 represented the position at the common law as expressed by Evershed MR in *Tufton v Sperni* [1952] 2 TLR 516.

[39] Tufton was an Englishman and a Muslim revert who regarded himself under a moral and religious obligation to assist the post-War Muslim community in England. He was persuaded by one Sperni, also a Muslim but whose adherence to the faith was not ardent, to purchase Sperni's home located in Doughty St in London for the purposes of an Islamic cultural centre. The sale of the house was documented in terms that were extravagantly in favour of

Sperni: The price was double the true value of the property. Sperni was entitled, notwithstanding completion, to continue as tenant for a notably low annual rent. Sperni was entitled at any time prior to completion to substitute another property having equal of greater capacity but without regard to its state of repair or value.

[40] At first instance, the judge held that Tufton had not proven that Sperni by virtue of his position and otherwise had acquired complete control or domination over Tufton, so that he ceased to be a free agent and his mind became a mere vehicle for Sperni's schemes. No appeal was made on this finding, and in any event the Court of Appeal considered it impossible for any challenge to be mounted against such a finding of fact.

[41] The Court of Appeal was nonetheless of the view that it could intervene if there had existed a relationship of confidence between Tufton and Sperni that imposed on the latter a duty of candour, and whether that there had been a breach of that duty that justified the setting aside of the purchase. Lord Evershed MR stated:

> The question then (and it is, I think, the only substantial question, but a difficult question) is whether on the very unusual and altogether remarkable facts of this case, as proved or found by the judge, there existed at the material time, such a relationship of confidence between Sperni and Tufton as imposed on the former a duty of candour such that on a breach of that duty being shown, a Court of Equity will intervene.

[42] The Court of Appeal set aside the purchase.

[43] This case well illustrates the principle that the requirements in sub-s (1) relating to the domination of the will of a party and the use of the dominant party's position to obtain an advantage need not be fulfilled where undue influence is presumed to exist pursuant to sub-s (2). A person who has real or apparent authority over another, or is fiduciary of that other person will be presumed to be in a position to dominate that other person's will. A similar presumption arises where a contract is made with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

[44] Even though s 16 has been held to embody the common law position regarding undue influence (in this regard, see also the decision of the Privy Council in *Poosathurai v Kannappa Chettiar* (1919) LR 47 In App 1, on appeal from India, in construing the equivalent provisions in the Indian Contract Act 1872), care must nonetheless still be taken in considering common law cases involving undue influence. Where the principles enunciated in these case depart from, or are inconsistent with, the express words used in s 16 of the

Contracts Act 1950, the statute must prevail.

[45] Subsection (3)(a) provides for the situation where the evidential burden is reversed, and placed on the alleged dominant party to disprove undue influence. This arises where the transaction in question appears either on its face or in the light of the evidence to be unconscionable.

[46] A reversal of the burden of proof is another way of saying that there will arise a rebuttable presumption. A question that arises is whether the presumption that arises under sub-s (3)(a) is intended to operate differently from the presumption under sub-s (2). The fact that they are addressed in different provisions in s 16 suggest that parliament must have intended for there to be a difference; this is considered further at para 49, post.

[47] The classification of the different categories of undue influence has been set out in the House of Lords decision of *Barclays Bank plc v O'Brien and another* [1993] 4 All ER 417, a decision that was applied in Malaysia by Sinnadurai J in *Polygram Records v The Search* [1994] 3 MLJ 127; [1994] 3 AMR 2060; [1994] 3 CLJ 806; [1994] 2 MLRH 137. In *Barclays Bank v O'Brien*, Lord Browne-Wilkinson stated:

> A person who has been induced to enter into a transaction by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed. In *Bank of Credit and Commerce International SA v Aboody (1988)* [1992] 4 All ER 955 at 964; [1990] 1 QB 923 at 953 the Court of Appeal helpfully adopted the following classification.
>
> Class 1: Actual undue influence. In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> Class 2: Presumed undue influence. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:
>
> Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.
>
> Class 2B. Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant

generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.

[48] Under the Contracts Act 1950 there is a third category provided for by sub-s (3)(a): Class 3 would be the transaction that appears on the face of it or in the light of the evidence adduced to be unconscionable. In such a case, the evidential burden lies on the alleged dominant party to disprove the allegation that the contract was induced by undue influence.

[49] I analyse below the inter-relationship between the operation of the presumptions in sub-ss (2) and (3)(a) and the three elements that constitute undue influence:

(a) under sub-s (2), once it is established that a party to a contract holds real or apparent authority over the other party, or is fiduciary of the other party, or where the other party's mental capacity is compromised though age, illness, or mental or physical distress, then the first party ('dominant party') will be presumed to be in a position to dominate the will of that other party. This presumption operates as a matter of law. In other words, it is not a presumption that is capable of being rebutted by evidence.

Note that only the first element of undue influence is presumed to exist. According to the strict words of sub-s (2), the other party must still prove that the dominant party had used his position to dominate the will of the other party, and that the contract that had been procured by such influence was one that was unfairly advantageous to the dominant party. This is because, by the express words of sub-s (2), the only matter that is deemed is that the dominant person is 'in a position to dominate the will of another'.

To use the example of a fiduciary: a fiduciary will be presumed to be in a position to dominate the party to whom the fiduciary duties are owed. That other party will nonetheless still bear the evidential burden of proving that the fiduciary used (or misused) the confidence reposed in him to attain an unfair advantage for himself; and

(b) by contrast, sub-s (3)(a) provides for the reversal of the burden of proof. Here, the person seeking to set aside the contract must first prove that the other party was in a position to dominate his will. He must also show that the contract in question was 'unconscionable', which I take to mean that it was unfairly disadvantageous to the party seeking to set aside the contract. Once these two elements have been established on evidence,

the burden will lie on the dominant party to show that the contract had not been procured by undue influence. He may do so by, for example, showing that the other party had received independent advice on the matters contained in the contract.

[50] I am acutely aware that the preceding paragraphs are not entirely consistent with the principles applied in cases decided under the common law. For example, Lord Browne-Wilkinson in *Barclays Bank v O'Brien* held that, where a fiduciary relationship exists, there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned and that the evidential burden is shifted to the fiduciary to prove that the complainant entered into the impugned transaction freely. While I accept that these are the principles that apply under common law, they cannot be adopted without adaptation into the Contracts Act 1950.

[51] There is considerable discussion in English cases whether manifest disadvantage to a complainant must be proven before a contract can be set aside for undue influence (see *Royal Bank of Scotland v Etridge (No 2) and other appeals; Barclays Bank plc v Coleman; Bank of Scotland v Bennett; Kenyon-Brown v Desmond Banks & Co (a firm)* [2001] 4 All ER 449; [2002] 2 AC 773). In my view, the debate is not germane to the Contracts Act 1950, for s 16(1) clearly provides that an unfair advantage must accrue to the dominant party. At all times, the person seeking to set aside the contract must show that the contract was unfairly disadvantageous to him.

[52] The domination of will of a person under s 16 is not limited to relationships of a domestic nature; it applies equally to commercial transactions: see *Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd.*

[53] It is important not to conflate the undue influence exerted by a party, and the relative strength of that party's bargaining power. The Court of Appeal in *Chua Yung Kim v Madlis bin Azid @ Aziz & Ors* [2018] 1 MLJ 192; [2017] 8 AMR 417; [2018] 3 CLJ 47; [2018] 1 MLRA 664 held that the two concepts were quite separate. Abdul Rahman Sebli JCA stated in that case:

> [31] Section 16 of the Contracts Act speaks of a relationship where one party is in a position to 'dominate the will' of the other and uses that position to obtain unfair advantage over that other. It is not a section that deals with inequality of bargaining power between two contracting parties.
>
> [32] There is a subtle but real difference between dominating a person's will and taking unfair advantage of one's superior bargaining power over that person. It was not the respondents' case that the appellant dominated their will. Their complaint was that the appellant had taken unfair advantage of his superior bargaining power over them.

[54] In this regard, illustration (d) to s 16 is particularly instructive. It will be recalled that illustration (d) provides as follows:

> (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

[55] The banker in such circumstances may appear to be in a relatively advantageous position, as it will be in a position to dictate interest rates (the reality, however, is that banks 'borrow' to fund their lending. Their borrowing comprises primarily the deposits placed with them. If there is a stringency in the money market, the bank's access to cheap deposits would be similarly affected). This illustration perfectly illustrates that the commercial pressures brought to bear upon a party to a contract cannot amount to undue influence. The borrower, A, accepts of his own free will the terms imposed by the bank, even though the terms may appear to be commercially disadvantageous. The relative standing of the parties — the desperation of A for funding, versus the indifference of the banker to the prospect of A's business — has no bearing on whether there has been a domination of the free will of A.

[56] In *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127, a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of the Straits Settlements, Singapore, held that the principle of undue influence applies equally to gifts. This case, however, was decided under the common law.

[57] Is a banker in a fiduciary relationship to its customer? In *Royal Bank of Scotland v Etridge (No 2)*, Lord Nichols of Birkenhead expressed the view that the banker-customer relationship would not normally give rise to a fiduciary relationship, but exceptionally it may (op cit at 795G). This is considered further at para 59 et seq, post.

The application of the principles to the facts

[58] In this case, the defence was premised upon presumed undue influence (see para 34 of the defendants outline submission). In the course of oral submissions, learned counsel for the defendants sought to argue that the plaintiff bank was in the position of a fiduciary vis a vis the defendants.

[59] Whether or not a person can be said to owe fiduciary duties will depend on whether the person is within a class of persons that has been determined by the courts to be fiduciaries. Such a determination must be made within the social and cultural context of the jurisdiction. In *Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd*, the Court of Appeal explained:

> Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the courts of a particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function. And as in so many other areas of the law, the views which our courts entertain may differ from those expressed by the courts of other jurisdictions in respect of the circumstances in which a fiduciary duty may be declared to exist. For this reason, our courts may impose a fiduciary duty in circumstances in which the courts of another jurisdiction may decline to find the existence of such a duty. Often, the standards imposed may be the same as those in other jurisdictions. But it is open to our courts to find the existence of a fiduciary duty in order to reflect our own standards which, in particular cases, may prove to be higher than those imposed by judges in other jurisdictions. This is a necessary consequence of the policy differences of which we spoke a moment ago.

[60] In England and Wales, the House of Lords has held that, in exceptional circumstances, a bank can be said to assume fiduciary duties. This statement bears further examination.

[61] Some banks in Malaysia operate as *universal banks*. This means that these banks not only undertake lending and deposit taking, but also activities more commonly associated with investment banking: stockbroking, investment advisory, fund management and corporate advisory businesses. On the one hand, there are certain businesses in which the banks take a position as a counterparty to its client. Nowhere is this clearer than when a bank lends to a borrower. The bank takes an interest that is directly opposed to that of the client.

[62] On the other hand, in certain other lines of businesses—typically associated with investment banking—the bank is bound to act in the best interest of the client. An example would be where a company that seeks the services of bank in order to be listed on the stock exchange. The client would be typically be serviced by the corporate finance advisory department within the bank. It is in these lines of businesses, that a bank would typically owe duties that are akin to those owed by fiduciaries: for instance, the duty to disclose any conflict between a duty owed to the client and its own proprietary interests.

[63] In the context of a loan by a bank to its customer, that banker-customer relationship is that of a debtor and creditor. This relationship generally does not impose any fiduciary obligations on the bank: see the judgment of Abdul Malik Ishak JCA in the Court of Appeal decision of *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619; [2014] 1 AMCR 1; [2014] 2 CLJ 773; [2014] 4 MLRA 104 at paras 90–116. Nonetheless, the common law has also developed to impose on a bank in certain limited circumstances a duty to exercise reasonable care and skill, arising both in equity

as a result of the fiduciary obligations imposed in a principal-agent relationship, and at law, as an implied contractual term. For instance, in the English case of *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363, Steyn J found that, when a bank effects transfers of money for its customer, it is bound to exercise reasonable care and skill in carrying out the payment instructions.

[64] Much reliance was placed by counsel for the defendants on the English Court of Appeal case of *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757; [1975] QB 326 in support for the proposition that the plaintiff bank here stood as fiduciaries as against the defendants.

[65] Herbert Bundy was an elderly farmer who mortgaged his house—his only asset—to the bank for loan that was given to his son's business. The business failed and the bank sought to foreclose against the home. The father had been a long-standing customer of the bank. Evidence was received from the bank manager that Mr Bundy had relied on him implicitly to advise him about the mortgage. Mr Bundy also testified that he had always trusted the manager and had simply sat back and did what the bank said.

[66] Lord Denning MR found that there had been an inequality of bargaining power in this case that justified the setting aside of the mortgage. He also found that the bank owed a fiduciary duty to Mr Bundy:

> The relationship between the bank and the father was one of trust and confidence, The bank knew that the father relied on it implicitly to advise him about the transaction. The father trusted the bank. This gave the bank much influence on the father. Yet the bank failed in that trust. It allowed the father to charge the house to his ruin.

[67] On the issue of inequality of bargaining power, Lord Denning MR was in the minority, for neither two other judges expressed a view on its application. Sir Richard Sachs stated:

> As regard the wider areas covered in masterly survey in the judgment of Lord Denning MR, but not raised arguendo, I do not venture to express an opinion—though having some sympathy with the views that the courts should be able give relief to a party who has been subject to undue pressure as defined in the concluding passage of his judgment on that point.

[68] *Lloyds Bank v Bundy* came to be considered in the House of Lords decision of *National Westminster Bank plc v Morgan* [1985] 1 All ER 821; [1985] AC 686. The following passages from the judgment of Lord Scarman make it abundantly clear that the banker-customer relationship would only give rise to fiduciary duties in the most exceptional of cases, and that 'inequality of bargaining power' did not provide the juridical basis for setting aside a

contract for undue influence:

> This brings me to *Lloyds Bank Ltd v Bundy* [1975] QB 326. It was, as one would expect, conceded by counsel for the respondent that the relationship between banker and customer is not one which ordinarily gives rise to a presumption of undue influence: and that in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open to a charge of undue influence. This proposition has never been in doubt, though some, it would appear, have thought that the Court of Appeal held otherwise in *Lloyds Bank Ltd v Bundy*. If any such view has gained currency, let it be destroyed now once and for all time: see Lord Denning MR, at p 336F, Cairns LJ, at p 340D, and Sir Eric Sachs, at pp 341H–342A. Your Lordships are, of course, not concerned with the interpretation put upon the facts in that case by the Court of Appeal: the present case is not a rehearing of that case. The question which the House does have to answer is: did the court in *Lloyds Bank Ltd v Bundy* accurately state the law?
>
> Lord Denning MR believed that the doctrine of undue influence could be subsumed under a general principle that English courts will grant relief where there has been 'inequality of bargaining power' (p 339). He deliberately avoided reference to the will of one party being dominated or overcome by another. The majority of the court did not follow him; they based their decision on the orthodox view of the doctrine as expounded in *Allcard v Skinner* 36 ChD 145. The opinion of the Master of the Rolls, therefore, was not the ground of the court's decision, which was to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment.

[69] I now turn to the facts of the present case. The first question is whether the facts disclose that there existed such a relationship of trust, confidence and reliance between the bank and defendants that would make the bank a fiduciary of the defendants?

[70] The sole item of evidence relied upon by the defendant to establish the existence of this relationship was the answers given in cross examination by the bank's witness, Ms Jovena Lau. Ms Lau was a senior manager in the bank's corporate recovery department. By her own testimony, she had not initiated the business relationship with the borrower. She was, however, responsible since 2011 for monitoring the banking facilities provided to the borrower. (The initial breach by the borrower of the repayment terms occurred in September 2010.)

[71] The contended by counsel for the defendants that Ms Lau's testimony established that the bank was a fiduciary of the borrower. The following were the answers that she had given under cross-examination regarding this point:

Mr Pavendeep Singh (counsel for the defendant)	Due to the long standing relationship between the plaintiff and the defendants throughout the years, there's an element of trust and confidence involved. Do you agree?

Ms Jovena Lau	Depends. It had to be based on the record and history of how the borrower performed and honoured their promises
PS	My question is in the general sense, in a banking transaction, isn't it normal for there to be an element of trust and confidence between the bank, as the borrower, and the customer?
JL	I'm not in the position to answer this, because I am in recovery and I'm not the person who actually initiated the long and established relationship with the customer.
PS	That's not my question. The question is, in a banking relationship, it is normal for there to be a relationship of trust and confidence. Do you agree? Putting it simply, if you don't trust someone, you wouldn't do business with them.
JL	Yes (see pp 17–18 of the notes of proceedings).

[72] The relationship of trust and confidence that arises in a *normal banking relationship* is clearly insufficient to amount to a fiduciary relationship, based on the authorities cited above. As was pointed by Lord Scarman in *National Westminster Bank v Morgan* and by Lord Nichols in *Royal Bank of Scotland v Etridge (No 2)*, it is only in exceptional cases that a banker-customer relationship would give rise to fiduciary duties. Here, counsel suggested to the witness she would not do business with someone whom she did not trust, to which she quite reasonably agreed. By no stretch of the imagination could her answer be said to be indicative of the existence of a fiduciary relationship.

[73] I therefore found that the bank was not a fiduciary to the defendants in this case and that accordingly the deeming provision in s 16(2)(a) of the Contracts Act 1950 did not apply.

[74] Learned counsel did not seek to argue that s 16(3)(a) applied on the facts of this case. In any event, I was of the view that none of the bank's letter of 12 December 2013, the consent judgment of 13 December 2013 or the restructuring agreement of 21 March 2014 were, on their face, unconscionable. Accordingly, there was no reversal of the burden of proof pursuant to s 16(3)(a).

[75] The defendants therefore needed to prove actual undue influence, under s 16(1) of the Contracts Act 1950, and the three constituent elements explained at para 37 ante.

[76] I was of the view that the contention of undue influence has not been made out.

[77] The following were cited as evidence in support of the contention of undue influence:

(a) the fact that the first defendant was pushed into accepting the terms contained in a letter by the bank addressed Bank Negara Malaysia dated 10 December 2013 (which letter was only given to the defendants on 11 December 2013) and for these terms to form the basis of a consent order;

(b) only two days were given to consider the terms of the settlement proposal; and

(c) the plaintiff were in a stronger bargaining position and that the 'defendants were reliant on the positions taken by the plaintiff on its affairs'.

[78] In my view, it was entirely open to the defendants to have rejected the proposed settlement offer and to proceed to trial. The pressure that was brought about by the need to make a decision whether to settle or to proceed to trial was not a pressure that would lead the court to find that undue influence has been exerted on the defendants. The pressure that the borrower experienced was *commercial pressure*, which persons in commerce have to undergo as part of their day-to-day business.

[79] As explained at paras 54–55 ante, this is made clear in illustration (d) to s 16. Section 16 is concerned not with the lack of parity in the parties' bargaining position, but rather in the dominance of the will of the bank over the defendants. There indeed was little time for the borrower to consider the terms of the bank's settlement offer, but that did not mean that there was a subversion of the will of the directors. I was satisfied that the way in which the relationship was managed by the bank was nothing more than the proper conduct of its business in the ordinary course, which, by virtue of illustration (d), precluded any notion of undue influence.

[80] On the contrary, there was ample uncontroverted evidence to suggest that the bank had been more than accommodating with the borrower. After the facilities went into default in September 2010, the bank agreed on 20 October 2010 to allow the borrower to repay the amounts outstanding over a period of 11 months. The lowest monthly repayment sum under this first settlement proposal was RM200,000. The borrower failed to adhere to the terms of this first settlement. Its fixed deposit that had been charged to the bank was then applied by the bank towards reduction of its debts of the bank. On 1 December 2011, the bank allowed the borrower to repay its outstanding debts by way of

monthly instalments of RM50,000. Shortly thereafter, the borrower again defaulted on its repayment obligations, which then prompted the bank to commence the 2013 suit. On 1 October 2013, the borrower submitted an application to Bank Negara for assistance under its small debt resolution scheme. This prompted the bank to inform Bank Negara on 10 December 2013 that it was agreeable for the borrower's debts to be rescheduled into the RTL facility, which it will be recalled provided for a seven-year repayment period. The consent judgement was then recorded on 13 December 2013. Under the terms of the RTL facility, the monthly repayment was further reduced, this time to RM25,000 for the first two years and RM35,000 thereafter. However, the borrower again defaulted on its repayment obligations. On 12 December 2017, the bank — for the fourth time — granted accommodation to the borrower, permitting it to address the arrears by increased monthly repayments. On 30 March 2018, the bank granted the borrower a further accommodation by allowing it time to dispose of real property charged to bank to partially settle the amounts outstanding under the RTL facility. The monthly repayments were also reduced to RM15,000 pending the sale of the property. The borrower did not adhere to this fifth and final terms of settlement, which then led the bank to commence this suit.

[81] The objective uncontroverted facts of this case clearly established that the bank was not in any meaningful way in any position to dictate terms to the borrower or to bend the borrower's will to meet its own ends. Accommodation after accommodation had been given, and each time the settlement terms were not adhered to by the borrower. A holistic examination of the circumstances leading up to the recording of the consent judgement showed that there had not and could not have been any victimisation of the borrower.

[82] For this same reason, any notion that somehow the terms of the RTL facility was unfairly advantageous to the bank can safely be dispelled.

[83] I have determined this case on the basis that the defendants at all times bore the evidential burden of proving their contention of undue influence. As explained above, there is a significant difference in the manner in which the presumptions operate at common law, and under s 16 of the Contracts Act 1950. Under statute there is, in *stricto sensu*, no such thing as 'presumed undue influence' as exists under common law. There is a presumption of dominant position (s 16(2)), and a rebuttable presumption that undue influence had been applied by the dominant party (s 16(3)(a)), but the person seeking to set aside the contract will continue to bear the evidential burden of the other elements.

[84] The matters discussed thus far were sufficient to dispose of the contention of undue influence without reference to the fact of legal representation.

[85] As explained at paras 32–33 ante, there was admissible evidence before the court that defendant was represented at the material time by legal advisers. The involvement of solicitors representing the defendants was evident from the consent order itself as well as correspondence between the solicitors. The court may thus infer that the defendants had access to legal advice at the time it was alleged that there had been undue influence. This was an additional reason to conclude that the allegation of undue influence had not been made out. Be that as it may, I would have arrived at the same conclusion even if the evidence of legal representation was not taken into account.

LIABILITY OF THE SECOND AND THIRD DEFENDANTS

[86] By the terms of the personal guarantee executed by the second and third defendants, they agreed to pay on demand the indebtedness of the borrower to the bank. The guarantee was a continuing guarantee.

[87] At law, the liability of a guarantor is co-extensive with that of the obligor (the borrower in this case). Under s 81 of the Contracts Act 1950, the bank has a right to sue the second and third defendants for their undertakings in the personal guarantee. Accordingly, once the bank's solicitors issued a letter of demand dated 25 May 2018 to the second and third defendants, their liability arose to pay the amounts owed by the borrower to the bank.

[88] As alluded to earlier in this judgment, the terms of the personal guarantee not only provided for liability of the second and third defendants as surety of the obligations of the borrower under the facility agreement, but also provided — in cl 9 — that they were principal debtors for the guaranteed obligations. As such, on its true construction, the personal guarantee was also a contract of indemnity. The validity of the obligations under an indemnity is unaffected by, and not dependent on, the validity of the obligations of the original obligor. This is because the undertaking by the second and third defendants to pay the indebtedness owed by the borrower was also a primary obligation of the second and third defendants.

[89] It thus follows that, even if the consent judgment and the restructuring agreement were void or otherwise unenforceable for whatever reason, the second and third defendants were still liable to the bank personally as indemnifiers for the indebtedness of the borrower. All that the bank needed to show was that the indebtedness remained outstanding and that a demand had been made, both of which facts were not disputed in this case.

[90] In addition, cl 8(g) of the personal guarantee specifically provided that the obligations under the personal guarantee were not affected by any unenforceability or invalidity of the obligations of the borrower, which reinforces the point that the personal guarantee was on its true construction a contract of guarantee and indemnity.

[91] Pursuant to cl 11.02 of the facilities agreement and cl 16 of the personal guarantee, the bank was entitled to simultaneously claim against the borrower and the first and second defendants as surety and indemnifiers.

[92] In the Supreme Court case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 1 AMR 1036; [1997] 2 CLJ 36; [1996] 2 MLRA 491, it was held:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842.

[93] There was thus no requirement for the bank in this case to have first exhausted its remedies against the borrower or H&I Niaga Sdn Bhd before it may proceed against the second and third defendants.

CONCLUSION

[94] The existence of the loan from the bank to the borrower was not disputed, nor the fact that the loan had not yet been repaid. The defendants sought to argue that the plaintiffs were precluded from claiming against them because the bank's sole recourse was against the obligor under the deed of assignment of contract proceeds, and that the consent judgment and the restructuring agreement were not enforceable on account of undue influence applied by the bank at the time the consent judgment was recorded.

[95] For the reasons explained in this judgment, I found that the defences had not been made out, and I accordingly entered judgment for the plaintiff. The defendants were ordered to bear costs of the action.

Claim allowed with costs.

Reported by Izzat Fauzan